

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35155

FPN-USA, INC.—OPERATION EXEMPTION—TIJUANA-TECATE SHORTLINE

Decided: August 8, 2008

On July 11, 2008, FPN-USA, Inc. (FPN), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to operate an approximately 44.6-mile line of railroad known as the Tijuana-Tecate Shortline (TTS). The Mexican State of Baja California owns that portion of the line that is within Mexico. The San Diego & Arizona Eastern Railway Company (SD&AE), a non-profit public benefit corporation controlled by the San Diego Metropolitan Transit System (SDMT), is the owner of those portions of the rail line in the United States that connect to each end of the TTS. According to FPN, “almost all” of the line is in Mexico, with the line extending between approximately milepost 15.0 at San Ysidro, CA, and milepost 59.6 at Division, CA, and running through Baja California, Mexico.<sup>1</sup> In addition to the operating exception it seeks, FPN proposes to acquire what it calls incidental trackage rights over track assertedly being operated by Carrizo Gorge Railway, Inc. (CZRY) between milepost 59.6 at Division and milepost 65.8 at Campo, CA.<sup>2</sup>

On July 24, 2008, SD&AE requested that the Board reject the notice on the grounds that: (1) the transaction is not within the Board’s jurisdiction because the TTS is entirely located in Mexico; (2) the “incidental trackage rights” that FPN seeks, which are located within the United States and thus would fall under Board jurisdiction, are actually interchange rights, which do not require advance Board authority; and (3) the notice contains materially false or misleading information in two respects — first, its statement that the proposed transaction entails acquisition of rights to operate in the United States; and second, its erroneous statement that FPN had

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<sup>1</sup> According to FPN, it will shortly submit a proposal to the Mexican State of Baja California to operate the line and would commence operations if this proposal is accepted and an operating agreement is executed.

<sup>2</sup> See Carrizo Gorge Railway, Inc.—Operation Exemption—Line of San Diego and Arizona Eastern Railway Company and San Diego & Imperial Valley Railroad Company, Inc., STB Finance Docket No. 34078 (STB served Aug. 16, 2001) (authorizing CZRY to operate approximately 6.2 miles of rail line between milepost 59.60 at Division, CA and milepost 65.80 at Campo, CA, for the purpose of interchanging traffic originating or terminating in Mexico on the TTS). On July 18, 2008, FPN stated that it intends to enter into a trackage rights agreement with CZRY.

notified the San Diego & Imperial Valley Railroad Company (SDIV), the San Diego Metropolitan Transit Development Board (MTDB), and the Union Pacific Railroad Company (UP) of its intent to commence operations over the TTS.<sup>3</sup>

On August 1, 2008, CZRY also sought rejection of FPN's notice of exemption, or alternatively, a stay of the effectiveness of the exemption. While supporting the arguments submitted by SD&AE, CZRY also asserts that, because there is no transportation over the TTS line occurring within the United States, there can be no "incidental" trackage rights subject to Board jurisdiction. Moreover, because the notice of exemption does not contain an agreement for the proposed transaction with the owner of the rail line,<sup>4</sup> or proffer details about when such agreement will be reached, CZRY submits that the Board must reject the notice under 49 CFR 1150.33(c) as prematurely filed. Lastly, CZRY describes as false and misleading FPN's claim that the Mexican government is seeking bids for a new operator due to problems with CZRY's service over the TTS. CZRY states that it resolved past service problems in March 2008, it is under new management, and it has a 20-year agreement to operate the TTS line.

The notice of exemption will be rejected. FPN has not demonstrated that the line over which it seeks authority is even within the United States and thus that this transaction is subject to the Board's jurisdiction under 49 U.S.C. 10501(a)(2)(E). And, without any transportation over a rail line within the United States, there could be no authorization of incidental trackage rights associated with any Board-approved transaction. Incidental trackage rights are embraced within the class exemption established at 49 CFR 1150.31 *et. seq.* because they are related to the acquisition. Thus an entity seeking to acquire such rights may obtain the Board's authorization to do so by invoking the class exemption. But if the line sought to be acquired by invoking the class exemption lies outside the Board's jurisdiction, the class exemption may not be invoked for that acquisition and is therefore unavailable for any acquisition of trackage rights that may be related to the acquisition, even if the trackage rights would be subject to the Board's jurisdiction if separately sought pursuant to the class exemption for trackage rights, 49 CFR 1180.2(d)(7). Further, on the basis of the filings by SD&AE and CZRY, it appears that the notice contains false and misleading information regarding, at a minimum, the statement that FPN provided notice to officials of MTDB, SD&IV, and UP of the filing for exemption.

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<sup>3</sup> In a letter filed on July 21, 2008, SDIV, which provided freight service over a line of railroad that includes the TTS until it subleased its operations over the TTS to CZRY, stated that, in fact, FPN had not notified SDIV that it intended to operate over the TTS. On August 1, 2008, SDIV also filed a letter in support of the request for rejection filed by SD&AE.

<sup>4</sup> CZRY also contends that it does not own the track within the United States between Division and Campo, CA, for which FPN seeks trackage rights (and if it did, would not grant trackage rights to FPN).

Notices of exemption are intended to be used for routine and non-controversial cases.<sup>5</sup> But, as filed, and in light of the issues raised by SD&AE, SDIV and CZRY, FPN's notice does not seem routine or non-controversial, and indeed raises more questions than it answers. Where, as here, there are too many unanswered questions, the Board will reject a notice.<sup>6</sup>

The decision does not preclude FPN from filing a new notice of exemption that provides clear and adequate information and meets the relevant criteria, or from filing a petition for exemption if the authority it seeks will raise controversial or complex issues.

FPN filed a request for a protective order concurrently with its notice. Because the notice will be rejected, the request for a protective order will be dismissed as moot.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The notice of exemption is rejected.
2. The request for a protective order is dismissed.
3. This decision is effective on its service date.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary

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<sup>5</sup> See Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-On-Hudson, NY, STB Finance Docket No. 34734 (STB served Nov. 17, 2005); James Riffin d/b/a the Northern Central Railroad—Acquisition and Operation Exemption—In York County, PA, STB Finance Docket No. 34501 (STB served Feb. 23, 2005).

<sup>6</sup> See Pro-Go Corp.—Operation Exemption—in Suffolk County, NY, STB Finance Docket No. 35120 (STB served Mar. 13, 2008).